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JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

October Term, 1957

No. 888

FIRST NATIONAL BANK IN INDIANA, PENNSYLVANIA,

Petitioner,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

First National Bank in Indiana, Pa. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered February 5, 1957 affirming the judgment of the District Court against Petitioner First National Bank in Indiana, Pa. which became final upon denial of petition for rehearing March 12, 1957.

I. Opinions below and in this Court.

The opinion of the District Court is unreported and is printed in the Appendix "A" of this petition, page 16.

The *first* opinion of the Court of Appeals and dissenting opinion is reported in 226 Fed. 2nd 297. For convenience of the Court we have had copy of material excerpt of the majority opinion printed in the Appendix "B", page 18.

Decision of the United States Supreme Court on this case is reported at 352 U. S. 29; for convenience of the Court copies of the majority opinion and dissenting opinion are printed in the Appendix "C", page 19. The *second* opinion of the United States Court of Appeals for the Third Circuit is unreported but for convenience of the Court a copl is printed in the Appendix "D", page 25.

II. Jurisdiction.

(a) The date that the judgment was entered was February 5, 1957.

(b) The said judgment became final upon the denial of petition for rehearing on March 12, 1957.

(c) The jurisdiction of this Court is invoked under the Act of Congress of June 28, 1948 C. 646, 62 Stat. 928 as amended. (28 U. S. C. 1254 (1).)

III. Questions Presented.

1. The United States Court of Appeals has drastically contravened an important principle of the law of Pennsylvania and decided this case exactly contrary to the decision of the highest Appellate Court of that Commonwealth.

2. The Court of Appeals comes to an entirely opposite factual conclusion in its second decision from that of its first decision, without giving any reasons therefor.

IV. Statutes Involved.

Conformity Act, Title 28 U. S. C. A. Section 1652.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 656, 62 Stat. 944.

Negotiable Instruments Law of Pennsylvania.

Act of May 16, 1901, P. L. 194, Ch. I, Art. IV, Section 56,

56 Purdon's Pennsylvania Laws, Sec. 136.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

V. Statement of the Case.

This is a civil action brought by Bank of America National Trust and Savings Association of San Francisco, California against, *inter alia*, First National Bank in Indiana, of Indiana, Pennsylvania, this petitioner, wherein this petitioner is charged separately with having converted on September 28, 1948 and October 25, 1948, respectively, two lots of Home Owners' Loan Corporation bonds of the value of $57,600.00. The bonds in question were all issued under Act of Congress approved April 27, 1934, were at all relevant times negotiable, payable to bearer, guaranteed by the United States Government and subject to call on or after May 1, 1944 but not due until

May 1, 1952. (See Exhibit 1-A Record, specimen copy of bond 449a and plaintiff's Answer to Defendant Bank's Request for Admissions 28a.) The bonds had been called for redemption on May 1, 1944 (Record 64a).

All of the bonds in this case with other securities disappeared from plaintiff's banking place of business, San Francisco, California on May 2, 1944 (the story of this disappearance appears in testimony of Miss Britton, 59a to 71a).

The bonds, the subject of suit, were handled through Defendant Bank in two separate lots, at separate times under identical facts, as to this Defendant. We state the facts as to only one lot.

The bonds described in the Complaint in the condition received (13a) were placed in the hands of Defendant Bank on September 28, 1948 for redemption or collection by Gilbert S. Parnell, an attorney, a depositor of the bank and also a director, without Defendant Bank having any notice of defect or infirmity. (See Plaintiff's Answer to Defendant Bank's Request for Admissions (b), 28a and testimony of cashier of Defendant Bank 339a to 341a, inclusive.) This lot of bonds was sent in the condition received on September 28, 1948 by letter signed by T. Edgar Walker, Assistant Cashier of Defendant Bank, to the Pittsburgh Branch of Federal Reserve Bank of Cleveland for redemption (letter Exhibit 1, 20a). Pittsburgh Branch of Federal Reserve Bank credited the proceeds of redemption on September 30, 1948 of this first lot of bonds to First National Bank in Indiana, Pa. in the sum of $19,600.00 (Ex. 2, 21a). First National Bank in Indiana, on October 1, 1948 paid by cashier's check signed by T. Edgar Walker, Assistant Cashier, to the order of Gilbert S. Parnell, attorney at law, the sum of $19,590.00, $10.00

having been deducted as the bank's expenses (see Ex. 3, 22a, also record 332a to 334a, inclusive).

Judgment was entered upon jury verdict against Petitioner, Defendant First National Bank in Indiana, in the sum of $57,600.00 without interest. In due course, appeal was taken to the Court of Appeal for the Third Circuit. After argument before three judges, and then argument before the Circuit Court *en banc* of seven judges, the Court of Appeals, by a majority opinion of four judges on October 12, 1955, reversed the judgment of the District Court and ordered judgment entered in favor of Petitioner First National Bank in Indiana (Opinion Excerpts —Appendix B hereto).

Thereafter a Writ of Certiorari was granted by this Honorable Court to review the judgment of the Court of Appeals. Following argument before this Honorable Court, on November 13, 1956 a majority opinion, written by Mr. Justice Frankfurter in which a dissent opinion was filed by Mr. Justice Black, joined in by Mr. Justice Douglas, the Court remanded the case to the United States Court of Appeals for further proceedings in accordance therewith (Opinion and Dissent—Appendix C hereto).

A hearing was again had before the United States Court of Appeals and on February 5, 1957 the Court of Appeals entered an order affirming the judgment of the District Court (Opinion—Appendix D hereto).

The facts which the Court of Appeals in this *second* opinion cites as lack of evidence of good faith by Petitioner, Bank in Indiana, i.e. knowledge of call, telephone notice to depositor when funds available, delivery of cashier's check and cashing thereof, are the identical facts which the same Court in its *first* opinion, holds clearly to

be no evidence whatever of bad faith. (Compare Excerpt Opinion—Appendix B with Opinion—Appendix D, Topic II, para. 2).

In view of an incorrect application of state law of Pennsylvania to this case, as directed by the judgment of this Honorable Court, a petition for a Writ of Certiorari is here submitted.

VI. Reason For Granting Writ of Certiorari and Argument.

IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF LAW OF THE STATE OF PENNSYLVANIA IN A WAY WHICH IS IN CONFLICT WITH PENNSYLVANIA STATE DECISIONS

Where There Are Special And Important Reasons, As Here, The United States Supreme Court Will Review The Decision Of The Court Of Appeals When In Conflict With Applicable State Law.

Where there are special and important reasons therefor, this Honorable Court will review on certiorari an important state or territorial question decided in a way in conflict with applicable state or territorial law. (Rule 19, 1(b) Supreme Court Rules, 28 United States Code Annotated.)

Considerations here are of the greatest import to general banking practice. The service to a customer which the petitioner bank was performing for a nominal charge to cover transmittal expenses, was one which is being done by all banks daily. Such enables the free flow of negotiable paper in commerce. Banks are a primary agent or conduit for the transmittal of negotiable bonds, notes, drafts, letters of credit and all such documentary instruments of

credit. This is not a direct source of revenue for them, their prime business being the investment of funds in their hands for security. If the risk of collection business becomes too great, they will stop. (Service charges by banks are becoming more and more common to avoid a deficit in their collection type of work.) Any decision such as this decision of the Court of Appeals, the subject of this petition, which places such heavy liability on a conduit bank ($57,600 for a $30.00 service charge) where there is an absolute void of proof of bad faith, must of necessity, leave an extremely deterrent effect on a long established and widely used banking practice. Not just this decision, but the change in the policy of the law, without reason, is bad. Our argument is, therefore, in this petition, directed primarily at showing that the present decision of the Court of Appeals is of the greatest import and is clearly *not* the law of Pennsylvania, and that the Court of Appeals should follow that state's law as just and correct.

Did The Decision Of The United States Court Of Appeals Follow And Apply The Decisions Of The Highest State Court Of Pennsylvania?

We respectfully and unequivocally answer this question that it did not. The United States Court of Appeals, in its *first decision* October 12, 1955, specifically held:

> "As far as the Indiana Bank was concerned, we do not think there was any evidence of bad faith." (Then followed a complete analysis of the facts.) (Opinion reported 226 Fed. 2nd 297) (Excerpt opinion—Appendix B.)

The Court in its present decision, points to nothing whatever except suspicious circumstances, stating: "The circumstances with regard to negotiations were such as to arouse some suspicion." (Opinion—Appendix "D".)

Reserving our discussion of the facts, which we will refer to later, let us here refer to what the decisions of the highest court of the State of Pennsylvania has declared is the law to charge a defendant bank such as in the instant case, with liability.

The leading case which answers this question is the case of *First National Bank of Blairstown vs. Goldberg et al.*, 340 Pa. 337. The facts of the Goldberg case are substantially identical to those of the case at bar. As to the defendant bank in the Goldberg case, the Pennsylvania Supreme Court sets aside the verdict against it and enters judgment in the defendant Bank's favor, regardless of burden of proof. The Goldberg case is the one case directly in point. All others are rationale. The decision of the Court of Appeals here in question is diametrically opposite. The opinion in this case, page 340, most specifically states the law with supporting authorities, in the following language:

> "To defeat the rights of one dealing with negotiable securities it is not enough to show that he took them under circumstances which ought to excite the suspicion of a prudent man and cause him to make inquiry, but that he had actual knowledge of an infirmity or defect, or of such facts that his failure to make further inquiry would indicate a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a vice in the transaction. This test, that of good faith with respect to negotiable instruments, is prescribed alike at common law, by the Negotiable Instruments Law of 1901, P. L. 194, and by the Uniform Fiduciaries Act of 1923, P. L. 468: *Phelan v. Moss,* 67 Pa. 59; *Union Bank & Trust Co. v. Girard Trust Co.,* 307 Pa. 488, 500, 501, 161 A. 865, 868, 869; *Davis, Trustee v. Pennsylvania Company,* 337 Pa. 456, 459, 460, 12 A. 2d 66, 68, 69."

Here this Court definitely states "suspicious circumstances" are not enough.

The following authorities support this position:

Davis vs. Pennsylvania Co., 337 Pa. 456 March 25, 1940 at page 460: * * * It was not sufficient to establish notice of such infirmity or defect in title by proof of circumstances which ought to excite the suspicion of a prudent man, but that it is necessary to prove actual bad faith."

Union Bank & Trust Co. vs. Girard Trust Co., 307 Pa. 488 at page 500: "Bad faith is not a matter of conjecture; it must be proved, and, like many other facts may be proved by circumstantial evidence; but it is well settled that it is not sufficient to show suspicious circumstances * * * such as might lead a person before taking a paper to make inquiry, but material *mala fides* must be proved."

The above cases cite and refer to Section 56 of the Negotiable Instruments Law, 56 Purdon's Section 136, defining what constitutes notice of infirmity or defect:

> "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. (1901, May 16, P. L. 194, ch. I, art. IV, Section 56.)"

Therefore under the Pennsylvania law "suspicious circumstances or circumstances * * * such as to arouse some suspicion" is not sufficient to charge bad faith. Actual knowledge of an infirmity or defect or such facts that failure to make inquiry would indicate a deliberate desire to evade knowledge is required. The United States Court of Appeals has failed to assess the evidence in this case as required in this light, as we will point out hereinafter.

Discussion Of The Assessment Of The Evidence In The Light Of The Standard Of Pennsylvania Law.

This case is important for two reasons: first, unless reversed, it places a liability on Defendant Bank, an innocent party in a transaction with a respected citizen of the community in which it profited nothing; and secondly, it is of public importance for if not reversed, the banking industry generally will never be safe in accepting negotiable bearer paper for collection or redemption. The injustice of the result of this case, as now reached, has presented the major question to which this United States Supreme Court went out of its way to have determined by the United States Court of Appeals. This Court called attention to the fact that irrespective of where the burden of proof lay, the question is whether the *entire record* establishes that there was bad faith on the part of Defendant Bank so that the verdict of the jury was wholly arbitrary and untenable. This Court evidently felt that this was the major question because, it nevertheless included in addition in the terms of its remand, namely that this Court (the United States Court of Appeals) "should assess the evidence in the light of that (Pennsylvania) standard".

What was the United States Court of Appeals test of liability?

The present opinion of the Court talks only of "some suspicious circumstances". That is not and never was the test in Pennsylvania. The Pennsylvania law is as stated in the Goldberg case, 340 Pa. 337, 340 as quoted *supra*. Under that and other cases, to create a liability the record must show *as a whole* not negligence, however great, but bad faith, which means actual knowledge or evasion to avoid knowledge, amounting therefore to real dishonesty and thereby approaching even criminal responsibility.

Where is there any evidence of bad faith in the record in this case?

The original opinion of this Court, after discussing each and all of the circumstances, categorically said there was no such evidence. That was a majority opinion and it is difficult to understand why there is now a reversal on that question by the Court without suggesting any explanation therefor. Not only is there no such evidence of *bad* faith, but the circumstances affirmatively showed *good* faith and, therefore, satisfied the burden of the bank in that respect.

What does the record show? It is said by the Court of Appeals that the bonds were overdue, but this Court by its opinion holds to the contrary by not reversing the first opinion of the Court of Appeals and the first decision of the Court of Appeals upon the case (Appendix B herewith) so held. Moreover, the Federal Reserve Bank accepted the bonds without question, which, in itself, shows that there was nothing suspicious about them by reason of that fact; indeed, the Federal Reserve Bank was exempted from liability in this case. It is said that the bank notified Parnell when the redemption money was received by it. This was such an ordinary courtesy under the circumstances, so insignificant and trivial, especially in view of the fact that Parnell was a director of the bank, that it would seem scarcely worthy of mention. It is said that Parnell, after receiving the cashier's checks, immediately had them cashed in bills of small denominations. But, after receiving the checks, the transaction was closed and his *subsequent* cashing of the checks could not possibly have shown that anything was wrong at the time he brought in the bonds for redemption, which is the time

the goodwill of the transaction must be judged. But, in any event, there was nothing sinister, suspicious, or even unusual in the cashing of the checks, for Parnell might reasonably have wanted or required the cash for some entirely proper purpose; that it was given in small denominations was not at his request, but because the bank, which is a bank in a small town, had only small bills in its possession. How could this cashing of the checks in small bills raise a suspicion in the mind of the cashier that the bonds had been stolen?

Note: It is well to note that the first decision of the Court of Appeals holds clearly that under Federal Law the bonds were negotiable after call but before final maturity. This Honorable Court held that "overdueness" was a Federal Question and thus did not reverse that holding. Yet, without reason, the current opinion of the Court of Appeals, would seem to reverse that holding by holding that knowledge of the call was notice to the bank.

Not only, therefore, were there no suspicious circumstances requiring or warranting any unusual inquiries on the part of the bank, but, on the contrary, it was dealing with a lawyer who had lived in this comparatively small community and practiced law there for many years, and, accordingly, was presumably well-known and respected at the bank, of which he was a director; he was, therefore, far from being merely a passing stranger. How could a cashier, dealing with a director, challenge or suspect his honesty when there was not the slightest ground for thinking that there was anything wrong or unusual in a mere request to transmit some bonds to the Federal Reserve Bank for redemption? As far as the Assistant Cashier was concerned, he being deceased, no presumption can arise that *he* was guilty of any wrongdoing. What more, then,

could the bank have done by way of testimony to satisfy its burden of proof? It certainly was not necessary for each of its officers and directors to go on the witness stand and affirmatively swear that he knew nothing about the transaction or of any irregularity in connection with it. If the record as a whole shows no semblance of bad faith, the bank certainly has met the burden imposed upon it. Here "some suspicion" was certainly far less than in the Goldberg case, where, although the burden of exculpation of wrongdoing was placed upon the bank, and although the jury rendered a verdict against the bank, the trial court granted an *n. o. v.* which the Supreme Court of Pennsylvania sustained. The Goldberg case is clear authority for the proposition that, on the basis of the record as a whole, if the circumstances indicate that there was no bad faith on the part of the bank in the transaction, the Court should nullify a merely capricious and unsupportable verdict.

VII. Decisions of Other States Holding Contra to the Present Decision of United States Court of Appeals.

While uniformity of State decisions is of no moment whatever under usual circumstances before this Court, this case is unique and should be considered in the light of the fact that it is decided under a uniform law, where the several states have thus shown desire for such uniformity; the circuit should not be permitted to so decide this case that it sets down a principle as if Pennsylvania law, contrary to that which the Penna. Supreme Court specifically has found the Pennsylvania law to be and particularly where the State Supreme Court is in accord with other states. With but little further comment we state some of the cases of other states as follows:

Gruntal v. Nat. Surety Corp., 254 N. Y. 483, 173 N. E. 682, 73 A. L. R. 1337;

Pratt v. Higginson, 230 Wash. 256, 119 N. E. 661;
and
Filasi v. Crossman, 111 Conn. 178, 149 Atl. 774.

In fact the opinion of the United States Court of Appeals concedes this Connecticut case supports our contention. On page 4 of the opinion (Appendix "B") is stated the following: "The argument is pressed that the cited section (referring to Section 59 of Negotiable Instruments Law) refers to actions on the instruments only and not to such a case as this. Filasi v. Crossman, 111 Conn. 178 (1930) is cited in support of this agreement. The language of Justice Wheeler does support it." We respectfully submit that Pennsylvania Law, too, is in accord and should not be tortured to a contrary position.

VIII. Conclusion.

This case was before this Honorable Court at No. 22 October Term, 1955. This Court, realizing the gravity of the case, remanded it to the United States Court of Appeals, directing it to assess the evidence irrespective of where the burden of proof lay. This could mean nothing other than an assessment or review of *all the evidence.* The United States Court of Appeals has disregarded the mandate of this Court in its failure to follow its direction to review all of the evidence and follow the applicable law of the State of Pennsylvania.

Basically, the clear and unexplained circumstance exists that, under identical facts, the Supreme Court of Pennsylvania sustained a judgment *N. O. V.* (notwithstanding a verdict) in favor of the defendant bank, and yet here, the Court of Appeals has seen fit to sustain judgment in favor of plaintiff on the verdict. The two results are legally and practically totally incompatible.

The Court of Appeals should not be permitted by consideration solely of its own choosing to contravene the law of the Commonwealth of Pennsylvania as clearly enunciated by the Highest Court of that state.

We therefore earnestly pray this Honorable Court to grant a Writ of Certiorari in order to correct the injustice to this defendant and avoid a different ruling by the United States Court of Appeals than that established by the highest state courts of Pennsylvania.

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APPENDIX A.

Memorandum Opinion of District Court and Order.

WILLSON, *D. J.*

This case might be termed the civil aftermath of the criminal case tried by Judge Marsh in this Court and reported as *United States v. Rocco*, 99 F. Supp. 746, affirmed *per curiam* by the Court of Appeals, 193 F. 2d 1008. One phase of the litigation relating to the disappearance of bonds from plaintiff's bank was before Judge Gourley on a motion for summary judgment and is reported in *National Surety Corp. v. First National Bank in Indiana*, 106 F. Supp. 302. The verdict of the jury was in favor of plaintiff in the amount of $57,600.00 against each of the three defendants, which was the face value of the bonds. The jury did not award any interest.

Defendants Gilbert S. Parnell and the First National Bank in Indiana ("Bank in Indiana") have motions pending for judgment *N. O. V.* and for a new trial. Defendant Arthur A. Rocco filed similar motions but withdrew them at the argument. Parnell and the Bank in Indiana insist that there was insufficient evidence to go to the jury and that the burden as to good faith was on the plaintiff throughout the case. Plaintiff's evidence indicated that the bonds in question were stolen from its bank on May 2, 1944. This point was left to the jury in the charge. The bonds were handed to the Bank in Indiana by Parnell and were, by the Bank in Indiana, forwarded to the Federal Reserve Bank by letter for collection. Neither Parnell nor the Bank in Indiana claimed to be a holder in due course within the definition of that term in the Negotiable Instruments Act, 56 P. S. 132. At the close of plaintiff's evidence, a motion by the Federal Reserve Bank of Cleve-

land for a directed verdict in its favor under Rule 50 (a) was granted. Plaintiff at argument indicated that it would not pursue that matter further so that under the present record the Federal Reserve Bank of Cleveland is dismissed finally from the case. The case was tried on the theory that the evidence indicated that the bonds were stolen from the plaintiff and that the defendants Parnell and the Bank in Indiana, not having paid anything of value for the bonds, were under the duty of showing that they acquired possession of the bonds innocently and in good faith and that in the trial the burden rested on them to show good faith. With respect to the trial procedure, especially in regard to the burden of proof, this Court followed the principles enunciated in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337. The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented. In the opinion of the Court substantial justice is done by the jury's verdict. The motions will be refused.

Plaintiff presented a motion to amend the judgment by adding to the $57,600.00 principal, interest at six per centum on the various amounts which made up the jury's verdict. The matter of interest was left to the jury under the charge. It was indicated to the jury that it might give interest from the date of the loss of the bonds to the date of the verdict and fix the rate of interest. It is pointed out that the claim of plaintiff was unliquidated until the verdict. It is believed that the question of interest is discretionary and again the Court is not disposed to disturb the finding of the jury. Accordingly, the motion to amend the judgment in this respect will be refused.

ORDER.

AND NOW, this 16th day of November, 1954, it is ORDERED:

2. Motions of the First National Bank in Indiana for judgment *N. O. V.* in its favor and for a new trial are refused.

JOSEPH P. WILLSON,
United States District Judge.

APPENDIX B.

Material Excerpts From First Opinion United States Court of Appeals (Reported 226 F. 2nd 297).

As far as the Indiana bank is concerned, we do not think there was any evidence of bad faith. There is nothing in the evidence presented by the plaintiff to evidence bad faith on the part of the Indiana bank, but the plaintiff relies upon evidence which was elicited from defense witnesses. There was evidence that the Indiana bank paid Parnell in bills of small denominations, the largest being one hundred dollar bills. There was also evidence that when the Indiana bank received credit from the Federal Reserve Bank for the bonds, a cashier telephoned to inform Parnell that the bonds had been cashed. In all these transactions, according to the plaintiff, Parnell acted for an undisclosed principal. These facts are all that plaintiff can rely on to sustain its burden of proof. Accepting these facts as we have outlined them, we do not think they show any bad faith on the part of the Indiana bank.

But an examination of the record does not disclose that Parnell specifically asked for small denominations, and

there is uncontradicted testimony by the cashier that the Indiana bank never carried on hand bills of a larger denomination than one hundred dollars. The evidence of small bills, of course, would be immaterial on the issue of good faith in accepting the first bonds. Even assuming the Indiana bank had larger bills and Parnell specifically requested small bills, the bank would not know this "suspicious" circumstance until after it had given Parnell the cashier's check. As to the second transaction, we must remember that almost a month had passed since the first transaction without any notice from the Federal Reserve Bank or anyone else that the first bonds were stolen bonds. As for the telephone calls from the cashier, the record does not at all indicate that the calls were special calls made directly to Parnell personally in some (fol. 65) secretive manner. In fact, the record indicates that Parnell's office received a call in September, when he was out of town, in connection with the cashing of certain bonds. In any event, it is difficult to see how a cashier's calls to a customer, who was also a director of the bank, awaiting payment of bonds indicates lack of good faith on the part of the Indiana bank. Many bank customers would demand such service.

APPENDIX C.

Opinion of United States Supreme Court and Dissenting Opinion.

Mr. Justice Frankfurter delivered the opinion of the Court.

Petitioner, alleging diversity of citizenship, brought suit in the District Court for the Western District of Pennsyl-

vania alleging that in September and October 1948 two individual defendants, the First National Bank in Indiana and the Federal Reserve Bank of Cleveland had converted 73 Home Owners' Loan Corporation bonds which belonged to petitioner. Only Parnell and the First National Bank are respondents here since the Federal Reserve Bank was dismissed, on its motion, after petitioner had presented its case in the District Court, and since Rocco did not appeal from the District Court's judgment.

At the trial it appeared that these bonds were bearer bonds with payment guaranteed by the United States. They carried interest coupons calling for semi-annual payment. They were due to mature May 1, 1952, but pursuant to their terms, had been called on or about May 1, 1944. On May 2, 1944, the bonds disappeared while petitioner was getting them ready for presentation to the Federal Reserve Bank for payment. In 1948 they were presented to the First National Bank for payment by Parnell on behalf of Rocco. The First National Bank forwarded them to the Federal Reserve Bank of Cleveland. It cashed them and paid the First National Bank, which issued cashier's checks to Parnell. Parnell then turned the proceeds over to Rocco less a fee—there was conflicting testimony as to whether the fee was nominal or substantial.

The principal issue at the trial was whether the respondents took the bonds in good faith, without knowledge or notice of the defect in title. On this issue the trial judge charged:

> "As I have indicated, however, in the case—and if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence.

> Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith * * *"

The jury brought in verdicts for petitioner against both respondents. On appeal, the Court of Appeals for the Third Circuit, the seven circuit judges sitting *en banc*, reversed, with three judges dissenting. It held that the District Court had erred in treating the case as an ordinary diversity case and in regarding state law as governing the rights of the parties and the burden of proof. 226 F. 2d 297. It considered our decision in *Clearfield Trust Co. v. United States*, 318 U. S. 363, controlling and held that federal law placed the burden of proof on petitioner to show notice and lack of good faith on the part of respondents. The court further found that there was no evidence of bad faith by the First National Bank since the bonds were not "overdue" as a matter of federal law when presented to it and therefore directed entry of judgment for it. The court found that there was evidence of bad faith on the part of Parnell but ordered a new trial because of the erroneous instructions.

The dissenters agreed in applying the doctrine of the *Clearfield Trust* case to determine the nature of the contract and the rights and duties of the United States as a party but not the rights of private transferees among themselves. They, like the majority, looked to federal law to determine whether the bonds were "overdue paper" when presented to the First National Bank. They concluded that since the respondent bank knew of the call, as to it, the bonds became demand paper and that the bank took the paper an unreasonable length of time after maturity, as advanced by the call.

In the view of the dissenters state law was controlling with respect to proof of good faith and the burden thereon. They found that state law placed the burden of proof on respondents to demonstrate their good faith, and that there was sufficient evidence to support the jury's verdict that the burden of proving good faith had not been sustained even if, with respect to the respondent bank, the bonds were not to be regarded as demand paper taken an unreasonable time after maturity, as advanced by the call.

Petitioner sought a writ of certiorari to review the judgments of the Court of Appeals. Because the determination of the applicable law raised an important issue of federal-state relations, we granted certiorari. 350 U. S. 963.

The District Court in this suit, based on diversity jurisdiction, for the conversion in Pennsylvania of pieces of paper of defined value deemed itself a court of Pennsylvania in which, in view of the nature of the claim, Pennsylvania law would govern. See *Guaranty Trust Co. v. York*, 326 U. S. 99, 108. But respondents claim, and the Court of Appeals sustained them, that the decision in *Clearfield Trust Co. v. United States*, 318 U. S. 363, compels the application of federal law to the entire case. The Court of Appeals misconceived the nature of this litigation in holding that the Clearfield Trust case controlled. In that case we held that a suit by the United States to recover on an express guaranty of prior endorsements on a Government check with a forged endorsement was governed by federal law. The basis for this decision was stated with unclouded explicitness:

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even with-

> out the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty." 318 U. S., at 367.

Securities issued by the Government generate immediate interests of the Government. These were dealt with in *Clearfield Trust* and in *National Metropolitan Bank v. United States,* 323 U. S. 454. But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.

We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties, or that it is beyond the range of federal legislation to deal comprehensively with Government paper. We do not of course foreclose such judicial or legislative action in appropriate situations by concluding that this controversy over burden of proof and good faith represents too essentially a private transaction not to be dealt with by the local law of Pennsylvania where the transactions took place. Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves. A decision with respect to

the "overdueness" of the bonds is therefore a matter of federal law, which, in view of our holding, we need not elucidate.

This conclusion requires reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. The Court of Appeals did not originally consider all the points raised by respondents. Moreover, since the Court of Appeals misconceived the applicable law, it is for that court to review the judgments of the District Court in the light of the controlling state law. The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the court which should so decide. Likewise, if state law casts the burden on respondents to demonstrate their good faith, it is for the Court of Appeals to assess the evidence in light of that standard.

The judgments of the Court of Appeals for the Third Circuit are therefore reversed and the cases are remanded to that court for proceedings in conformity with this opinion.

Reversed and remanded.

Dissenting Opinion.

Mr. Justice Black and Mr. Justice Douglas, dissenting.

The "federal law merchant" which *Clearfield Trust Co. v. United States*, 318 U. S. 363, 367, held applicable to transactions in the commercial paper of the United States should be applicable to all transactions in that paper. Indeed we said in *National Metropolitan Bank v. United States*, 323 U. S. 454, 456, that "legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law."

Not until today has a distinction been drawn between suits by the United States on that paper and suits by other parties to it. But the Court does not stop there. Because this is "essentially a private transaction," it is to be governed by local law. Yet the nature of the rights and obligations created by commercial paper of the United States Government is said to be controlled by federal law. Thus, federal law is to govern some portion of a dispute between private parties, while that portion of the dispute which is "essentially of local concern" is to be governed by local law. The uncertainties which inhere in such a dichotomy are obvious.

The virtue of a uniform law governing bonds, notes, and other paper issued by the United States is that it provides a certain and definite guide to the rights of all parties rather than subjecting them to the vagaries of the law of many States. The business of the United States will go on without that uniformity. But the policy surrounding our choice of law is concerned with the convenience, certainty, and definiteness in having one set of rules governing the rights of all parties to government paper, as contrasted to multiple rules. If the rule of the *Clearfield Trust* case is to be abandoned as to some parties, it should be abandoned as to all and we should start afresh on this problem.

APPENDIX D.

Second Opinion of United States Court of Appeals.

By Goodrich, Circuit Judge.

These cases are before this Court on remand from the Supreme Court of the United States, 352 U. S. 29 (1956).

The original suit was brought to recover the proceeds of certain bonds guaranteed by the United States and alleged to have been stolen from the plaintiff. It was further alleged that the bonds were paid by the Federal Reserve Bank of Cleveland to the defendant, First National Bank in Indiana, Pennsylvania, which in turn paid the proceeds to the defendant, Parnell, who in turn turned over all or part of the money to the defendant, Rocco. The Federal Reserve Bank of Cleveland was also an original defendant but was dismissed during the litigation. Rocco had judgment given against him but did not appeal. At the trial in the district court judgment was also given against Parnell and the Indiana Bank. When the case came to this Court the judgment was reversed, *226 F. 2d 297 (1955)*.

The case was heard by the full court which divided four to three. The difference between majority and minority was with regard to whether federal or state law applied as to the burden of proof to establish one a holder in due course of a negotiable instrument. The majority of the court thought that *Clearfield Trust Co. v. United States*, 318 U. S. 363 (1943), required the application of federal law and that the federal rule differed from that in Pennsylvania. The minority believed that since this was but an action between individuals, in which the United States was not concerned, the state law controlled. The Supreme Court, in holding that the *Clearfield* case did not apply, said:

> "The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regard-

> ing the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern." 353 U. S. at 33, 34.

The case was, therefore, remanded to this Court to determine the law of Pennsylvania and to see whether it was correctly applied at the trial to the facts brought out in evidence. This necessarily will take us over some of the ground covered in our original discussion in both majority and minority opinions.

I. The Pennsylvania Law.

The governing statute at the time the transactions herein took place was the Negotiable Instruments Law. The bonds were bearer paper. Under the statute one who is in possession of negotiable paper payable to bearer is a holder. *Negotiable Instruments Law*, 191; Pa. Stat. Ann. tit. 56, 492 (Purdon 1930). Rocco, Parnell and the Indiana Bank were all holders under this definition. Not only that, but they were persons to whom the instrument had been negotiated. Section 30 of the Negotiable Instruments Law states:

> "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery." Pa. Stat. Ann. tit. 56, 81 (Purdon 1930).

Now we come to the provision of the law that contains the controlling language for this case. That is Section 59 of the Negotiable Instruments Law and here is the appropriate section as it appears in Purdon's:

> "Burden of proof when title is defective.

> "Every holder is deemed *prima facie,* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Pa. Stat. Ann. tit. 56, 139 (Purdon 1930).

This section has been applied in almost innumerable law suits, as an inspection of any one of the books on the Negotiable Instruments Law will show. The point is made on behalf of the defendants that in this case we have an action for conversion of stolen instruments and not a suit against one of the parties thereon. The argument is pressed that the cited section refers to actions on the instrument only and not to such a case as this. *Filosi v. Crossman,* 111 Conn. 178, 149 Atl. 774 (1930), is cited in support of this argument. The language of Chief Justice Wheeler does support it.

But we are dealing only with Pennsylvania law in this particular phase of the inquiry. In *Schultheis v. Sellers,* 223 Pa. 513, 72 Atl. 887 (1909), Mr. Justice Mestrezat pointed out that almost a century before that:

> "* * * it was held, in an action on a promissory note, that the holder was required to show the consideration he paid for it and how it came into his hands, where the defendant proved that it was put into circulation fraudulently. This rule has been recognized and enforced in subsequent decisions." 223 Pa. at 516, 72 Atl. at 888.

The quotation just made is applicable to a suit upon the instrument and does not precisely meet the defendants' point. But *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337, 17 A. 2d 377 (1941) does meet it. Mr. Justice Stern says for the court:

> "It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion." 340 Pa. at 340, 17 A. 2d at 378.

In the Goldberg case the court came to the conclusion that under the proof the defendant was entitled to judgment. But the application of the law seems to us very clear. The discussion in the opinion referring to the Restatements of Agency and Torts, on which the appellants rely, is all based on the hypothesis of the good faith of the defendants in handling a negotiable instrument.

Again in *Brubaker v. County of Berks*, 381 Pa. 157, 112 A. 2d 620 (1955), we have the rule of the Negotiable Instruments Law applied in a case where the suit was not upon the instrument. The same application of the statute was made as in the *Goldberg* case.

We find no difficulty in determining Pennsylvania law which is in accord with the majority rule prior to the Negotiable Instruments Law and the overwhelming weight of authority since. The burden of proof set out in Section 59, above quoted, is applicable in this case.

II. The Case for the Jury.

As to Parnell, let us quote from the majority opinion when the case was here before. It will be remembered that the majority were going on the theory that the plaintiffs, not the defendants, had the burden on the issues of good faith and lack of value. Nevertheless, the Court said (as to Parnell):

> "There was evidence which, if believed, would sustain the jury's verdict that he acted in bad faith. From Rocco's testimony, the jury could have inferred

> that Parnell's fee for cashing the bonds was extremely high, being approximately ten per cent of the value of the bonds. A fee of five or six thousand dollars for the mere transmittal of bonds for redemption would be sufficient evidence from which a jury could find bad faith." *226 F. 2d at 302.*

With the burden of proof upon Parnell, not the Bank of America, the result is *a fortiori.*

As to the Indiana Bank, we think that there is enough evidence to support the jury's verdict, remembering that the burden is on that Bank to prove that it was a holder in due course. The Bank's then cashier admitted that he knew that the bonds had been called. The circumstances with regard to the negotiation were such as to arouse some suspicion. The two batches of bonds were concerned and one earlier had been collected by the bank on behalf of Parnell. Each time notification was given him by telephone by the same bank cashier. Each time he received a cashier's check and proceeded to cash the check in small bills forthwith. These items, of course, are not conclusive.

But it is to be remembered that the burden is on the bank. Its then cashier testified that he had no notice of any defect of title. His memory was vague on many surrounding circumstances concerning the transactions. That in itself is not enough to prove him dishonest since the transactions occurred some time before trial. But the jury saw the witness and heard his testimony. They had the fact, introduced in rebuttal, that he had been convicted of a felony of embezzlement. This was introduced without fanfare and whether it influenced the jury's consideration of his testimony we cannot know. The jury was not compelled to believe this bank officer. We have reread the testimony on this point. It does not justify setting aside a verdict against the party who had the burden of establishing good faith and lack of notice.

III. Joint and Several Tortfeasors.

At the first hearing of the case here the defendant bank raised the question of liability under Pennsylvania law of joint and several tortfeasors. This point was taken up in the dissenting opinion but not covered by the majority opinion since the majority was not called upon to decide it. The Supreme Court however, has sent the case back here to determine the undecided points. And so we repeat pretty largely what was said in the dissenting opinion.

Defendant bank asked for an instruction to the effect that the plaintiff could not have a verdict against more than one of these alleged converters. This instruction was refused and it claims error. We think the bank is incorrect. The general rule with regard to the liability of several persons in such an action as this is that the satisfaction of the judgment against one precludes proceeding against another. This is the rule as it appears in the Restatement, Torts, 886; Restatement, Judgments, 95, and this is the rule as it is generally applied in Pennsylvania. *Union of Russian Societies of St. Michael & St. George, Inc. v. Koss,* 348 Pa. 574, 36 A. 2d 433 (1944). There is some early authority in Pennsylvania that seems to indicate in actions for conversion that the securing of a judgment against one alleged tortfeasor has the same effect. See, *e.g., Hyde v. Kiehl,* 183 Pa. 414, 38 Atl. 998 (1898). These cases are not new and the authorities above cited announce the present-day rule. Whether the older cases represent the present law of Pennsylvania is doubtful. See Goodrich-Amram, Pennsylvania Procedural Rules Service, 2229 (b), 2232 (f)-1 (1940). But even then they do not go so far as to preclude a verdict against more than one defendant. It might well be, if they were still effective, that a plaintiff would have to elect, before judgment

was entered, which defendant he wanted to pursue. There is, we conclude, no merit in this point made by the defendant.

IV. Certain Objections to Evidence.

The defendants claim prejudice when the trial judge refused to allow them to show the remarks of the sentencing judge at the time the bank cashier was convicted. This is not a proper subject for complaint. The extent to which a witness may be rehabilitated after his credibility is attacked by showing that he has been convicted of a felony is a matter in which the trial judge has, and must have, wide control. *United States v. Boyer,* 150 F. 2d 595 (D. C. Cir. 1945.)

There were certain exhibits to which objection was made. These consisted of a notice sent out by the Federal Reserve Bank of San Francisco to the Pittsburgh Branch, Federal Reserve Bank of Cleveland and a copy of a notice circulated by the Federal Bureau of Investigation in the area of the Pittsburgh Branch of the Federal Reserve Bank of Cleveland. It is not claimed that any of these reached the Indiana Bank so as to charge it with the knowledge which these notices contained. The judge limited their use to the establishment of the loss by the plaintiff and that notices of the loss went out through banking channels. This was not error. The analogy of the "hue and cry" immediately suggests itself. And we think that the fact of a notice being broadcast in the bank's vicinity is admissible on the question of whether the bank may have had some knowledge.

The lack of possible harm from these exhibits even if the judge was too lenient in admitting them is observed

when one reads the interminable colloquy which preceded their admissions. At least six lawyers were involved and questions and objections came with rapid-fire frequency. One may seriously doubt whether the documents had any significance at all as they got to the jury. Nothing was said about them in the judge's charge and no one asked the judge to say anything more than he did on the point. It seems clear to us going through the record of a vigorously contested trial that instances of this kind are swallowed up in the sum total of the testimony and have no significance until lawyers examine the record to find error.

The case was technical. The Trial judge instructed the jury fully and accurately. The jury has reached a permissible conclusion.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

FILED
APR 26 19
JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 888

FIRST NATIONAL BANK IN INDIANA, PENNSYLVANIA, Petitioner

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals on the remand of the cases from this Court is now reported in 241 F. 2d 455.

STATEMENT

The present petition for a writ of certiorari seeks the review of a judgment entered by the Court of Appeals for the Third Circuit, following the remand from this Court earlier at this Term, 352 U.S. 29, and after a rehearing before the entire bench of seven judges.

The suit is a civil action brought by respondent in the District Court to recover for the conversion of

$57,600 principal amount of 3% Series A bearer bonds of Home Owners' Loan Corporation. The bonds involved were part of a larger group of Home Owners' Loan bonds which had been purchased by respondent and which were stolen by sneak thieves in May, 1944 while they were being prepared by respondent's clerk for transmission for payment (R. 32-92). Notice of the loss or theft of the bonds, including the serial numbers of the bonds, was disseminated promptly throughout the United States (R. 93-114).

In September of 1948 the defendant Rocco turned over to another defendant, Parnell, who was a lawyer, $25,000 of stolen West Penn Power Company and United States Treasury bonds (R. 467-475). Parnell took them to the defendant-petitioner First National Bank in Indiana, Pa., and the bank, acting through its cashier, disposed of them and gave Parnell a check, which he immediately endorsed and surrendered for currency (R. 467-469, 479-480; 313-314, 348-349).

Eighteen days after this transaction, Parnell brought into the defendant bank $19,600 of the Home Owners' Loan bonds here in suit, and twenty-seven days later brought in the remaining $38,000 of bonds, all of which he had received from Rocco in Pennsylvania (R. 13-14, 303-306). These bonds had been called for payment in 1944 (R. 64) and eight overdue coupons, representing four years' interest, were attached to each bond (R. 175). In each instance Parnell dealt with the cashier, the same man as before, who knew that the Home Owners' Loan bonds had been called for redemption as of a date almost four and a half years earlier (R. 468-469, 313-314, 343).

The defendant bank sent the first group of Home Owners' Loan bonds to the Federal Reserve Bank branch in Pittsburgh for redemption (R. 153, 171, 334-337). The cashier telephoned Parnell when a credit advice was received from Pittsburgh, and Parnell thereupon went to the bank and received a cashier's check, which he immediately cashed at the bank, taking the proceeds in currency in bills of $100 and smaller (R. 316-319, 344). Parnell took the currency to his office, telephoned Rocco that it was there, and paid him in currency. No receipts were given for the bonds; in fact, there were no receipts, correspondence, checks or writings given or received by Parnell except cashier's checks, which he cashed immediately on receipt (R. 311-313).

The $38,000 of bonds involved in the last transaction were handled in the same way, Parnell dealing with the same cashier and turning the cashier's check into small denomination bills immediately upon its receipt (R. 318, 345).

The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The credibility of the defendant Parnell was impeached by his own prior inconsistent testimony in another proceeding (R. 472-478) and also by the testimony of an F.B.I. Agent (R. 319, 371-375) and of the defendant Rocco (R. 482-483, 489-492). The testimony of the cashier, Straitiff, is conflicting in itself (R. 345-346) and also in conflict with the testimony of F.B.I. Agent Myers (R. 345, 353, 381). His credibility was impeached generally by the introduction of the record of his conviction of embezzlement from the defendant bank (R. 390-393).

The jury returned verdicts against each of three defendants and in favor of respondent in the amount of $57,600 (R. 439), and judgments were entered thereon (R. 448). The defendants Gilbert S. Parnell and First National Bank in Indiana appealed. No appeal was taken by Arthur A. Rocco, the third defendant against whom judgment was entered.

The Court of Appeals for the Third Circuit, after argument on the appeals, ordered a rehearing before the entire bench of seven judges. After this rehearing the judgments appealed from were reversed and the cause remanded upon the opinion of a majority of four members of the court holding that the questions were to be decided under federal law and that under federal law the respondents were not required to establish their defense of good faith purchasers.

"Because the determination of the applicable law raised an important issue of federal-state relations", 352 U.S. 32, this Court granted certiorari on a petition filed by the present respondent. After hearing argument the judgments were reversed by this Court and the cases remanded to the Court of Appeals. The cases were heard again by the entire bench of seven judges and the judgments entered by the District Court affirmed upon an opinion by Circuit Judge Goodrich speaking for a unanimous court.

ARGUMENT

I.

The Decision Below Raises Solely a Question of Pennsylvania Law

When this case was previously before the Court of Appeals, there was a question whether the rights of the parties were to be decided by (a) a uniform Federal law, or by (b) the law of Pennsylvania. The Court of Appeals, in its first decision, held that Federal law was applicable, and decided that, under Federal law, the burden of proving bad faith was on the present respondent. The Court then clearly indicated its opinion that the other result would have been reached if the law of Pennsylvania was applicable. Otherwise, there would have been no need to choose between Federal and Pennsylvania law.

The case then came to this Court, which held earlier this term, 352 U.S. 29, that the matter was governed by state law. This Court remanded the case to the Court of Appeals, saying (352 U.S. at 34): "The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the Court which should so decide."

The Court of Appeals has now made that decision. Thus, it has complied with the directions of this Court. There is nothing in its decision which requires further review here. Cf. *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280; and *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630.

II.

The Decision Below Is Correct, and Presents No Conflict With the Law of Pennsylvania

That the decision of the Court below on the question of burden of proof is in accordance with the law of Pennsylvania can be readily seen.

Reference may first be made to Section 59 of the Negotiable Instruments Law (Pa. Stat. Ann. Title 56, Section 139), which reads as follows:

> "Burden of proof when title is defective.
>
> "Every holder is deemed prima facie, to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

The Pennsylvania Supreme Court has held in an unbroken line of cases extending over many years that under this Section a party defending against an action on the ground that he is a holder in due course, or asserting a right to recover because he is such a holder, must prove all the elements necessary to constitute him such a holder once it has been shown that the title of any person who has negotiated the instrument was defective. The most recent case so holding appears to be *Brubaker v. Berks County*, 381 Pa. 157, 112 A.2d 620 (1955).

Section 59 was also construed in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337, 17 A.2d 377 (1941), which, like the case at bar, was an action by the owner of stolen bonds to recover from a lawyer and a bank alleged to have converted them. We quote from the opinion, 340 Pa. 340:

> "It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion. Plaintiff, however, itself presented all the facts through cross-examination of Goldberg, and is bound by his testimony, there being no contradiction of it: Krell v. Jacobson, 314 Pa. 522, 527, 172 A. 697, 699. From that testimony no inference of bad faith on the part of either defendant can be drawn."

The Pennsylvania Supreme Court in the Goldberg case approved the entry of a judgment n.o.v. by the trial court, but this in no way detracts from the authority of the case with respect to the Pennsylvania rule on burden of proof. As the second sentence of the quoted portion of the opinion clearly shows, the entry of a judgment n.o.v. was approved solely because the defendant's good faith had ceased to be a jury question under the familiar Pennsylvania rule that when one party calls the other party as for cross-examination he is bound by the testimony elicited in the absence of contradiction by other testimony.

In the present case, however, the testimony with respect to the conduct of the parties and the other

circumstances bearing on the petitioner's good faith was supported by, and depended solely upon, the oral testimony of petitioner's witnesses. In addition, the facts relied upon in the *Goldberg* case are so different as only to emphasize the inadequacy of petitioner's evidence with respect to its innocence and good faith.

Under the Pennsylvania law, the burden of proof on the issue of good faith was on the petitioner. This rule was correctly stated in the charge of the trial Court in the following terms (R. 422):

> ". . . if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence. Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith."

On the basis of this charge, the jury found a verdict against the petitioner (R. 439). The petitioner throughout its Brief fails to differentiate between the burden of proving bad faith, which is not an element in this case under the law of Pennsylvania, and its own burden to prove good faith. This the jury and the Court below have both held that it did not meet.

CONCLUSION

The decision below involves solely a question of Pennsylvania law. The decision of the question of Pennsylvania law is correct. No question is raised by the petition warranting review by this Court.

Respectfully submitted,

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April 1957.

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IN THE

Supreme Court of the United States

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Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The import to Pennsylvania banking policy, at the risk of excessively advocating our cause, dictates that we call this Honorable Court's attention to certain essential legal considerations which the opposition brief totally ignores —they are unanswerable:

First: The opposition, as well, the instant opinion of the Court of Appeals, entirely ignores the fact that in *First National Bank, Aplnt. vs. Goldberg and Land Title Bank and Trust Company,* 340 Pa. 337 (1941), the Supreme Court of Pennsylvania directly qualifies the only sentence upon which the Respondent attempts to stand wherein the Pennsylvania Court states, "• • • it is not enough to show

that he took them under circumstances which ought to excite the suspicion of a prudent man". They do not deny that the Goldberg Case is the law of Pennsylvania, they do not distinguish it, nor will they admit to follow it. Such cannot be reconciled for the just result of Goldberg, would be disastrous to their cause.

Second: We would respectfully quote the clear closing language of the Goldberg Case, entirely unanswered in opposition to sustain that which is admittedly the law of Pennsylvania:

> "It would seem strange if the broker, who is thus the conduit of a valid title, should be held responsible for a conversion although he acted in the same good faith as the purchaser. In the present case, defendants did not part with value for the bonds, but they do not claim any right, title or interest therein as holders; they derived no benefit from the transactions, acting merely as agencies to place the bonds in the hands of brokers for sale and to transmit the proceeds in return. The purpose of the Negotiable Instruments Law is to enhance the marketability of such securities and to allow bankers, brokers and people generally to trade in them with confidence. That object would be defeated if liability were to be imposed upon one who, mistakenly but in good faith, deals with negotiable instruments on the assumption that they belong to the person who employs him to effect their sale through ordinary market channels."

In the past, banks of Pennsylvania, acting under the law of the Goldberg Case, were assured that, in such non-profit, or nominal profit services, acting as a transfer agent for collection of negotiables, unless there were *mala fides* shown, they would not be held. Upon this they were willing to aid customers and parties known to them, to avoid the complications of that individual's identification to and direct correspondence with Reserve Banks, Registrars and

other transfer agents in other cities and in other states. It would not be so, if recovery would be permitted against them on a negative case. They would abandon such important services which yield nothing to them in profit. Such is not the law of Pennsylvania.

Thus, therefore, we respectfully request that this Honorable Court grant certiorari.

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JOHN T. FEY, Cl

In the

Supreme Court of the United States

No. 975

October Term, [redacted] 1956

GILBERT PARNELL,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWARD DUMBAULD
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GILBERT PARNELL,

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Gilbert S. Parnell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above styled case on February 5, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is printed as Appendix A hereto, page 19, *infra*. A prior opinion of the Court of Appeals reported at 226 F. (2d) 297 was reviewed by this Court at 352 U. S. 29.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957. Re-hearing was denied on March 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether, under Pennsylvania law, a "conduit" or intermediary in the process of transmitting bearer bonds to a Federal Reserve Bank for redemption is liable for conversion of the bonds handled.

STATUTES INVOLVED

Petitioner contends that no statutes are involved, the matter being governed by the common law of Pennsylvania as found in controlling judicial decisions of that State's Supreme Court. The Court of Appeals (erroneously, it is submitted) regarded section 59 of the Negotiable Instruments Law as applicable. That section reads:

"Every holder is deemed prima facie, to

be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." 56 Purdon's Statutes 139.

STATEMENT OF THE CASE

The facts of the case at bar are clearly stated in the first half-dozen paragraphs of the majority opinion of this Court at 352 U. S. 29. This Court there remanded the case to the Court of Appeals for determination in accordance with the law of Pennsylvania (under the *Erie* rule). The Court of Appeals thereupon, after argument, rendered the opinion here sought to be reviewed.

Recapitulating these facts for the convenience of the Court: Plaintiff in this case (Respondent here), a San Francisco bank, alleging diversity of citizenship, brought suit against four defendants, charging each of them with conversion of a number of bearer bonds which had disappeared on May 2, 1944, while the bank was getting them ready to present for payment. The bonds had been

called on May 1, 1944, but by their terms were due to mature on May 1, 1952. Under Treasury Regulations they were treated as government obligations, and were payable at any Federal Reserve Bank.

One of the four defendants, petitioner Parnell, senior partner in a country law firm at Indiana, Pennsylvania, was consulted in September, 1948, by one Rocco, the other individual defendant. Rocco's family had been clients of Parnell's firm, and Rocco sought advice regarding establishment of an automobile distributorship and a coal stripping operation. For these ventures he stated that he wished to turn some bonds into cash, and requested Parnell to handle the transaction at the First National Bank in Indiana, of which Parnell was a director. This bank was the third defendant in the case. It received the bonds from Parnell, and immediately sent them by registered mail to the Federal Reserve Bank of Cleveland (the fourth defendant), which as fiscal agent of the United States for the payment of such bonds effected such payment, in accordance with Treasury Regulations, by crediting the account of the bank in Indiana. That bank then issued Parnell a cashier's check for the amount collected (less a few dollars for expenses). Parnell cashed this

check at the bank and turned the proceeds in currency over to his client Rocco.[1] Subsequently[2] it was learned that these bonds were among those which had disappeared from the plaintiff's bank in San Francisco in 1944.

The trial court dismissed the action against the Federal Reserve Bank. A verdict was rendered against the other defendants. Rocco did not appeal. By a four to three decision, the Court of Appeals reversed, directing entry of judgment in favor of the Bank in Indiana and a new trial in the case of Parnell. This Court remanded the case for determination in accordance with the law of Pennsylvania rather than federal law. The Court

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[1] Parnell at some stage of his dealings with Rocco received a fee for his services (not for cashing the bonds, but for other services as an attorney). This fee was apparently paid out of the proceeds of bonds cashed. He says the amount was $650. (R. 317). According to Rocco, it was a larger amount. (R. 491-492). But this payment, whatever the amount was, took place *after completion of the transaction with respect to the bonds.* No other evidence tending to show bad faith on the part of Parnell is contained in the record.

[2] Parnell and the Bank had *no knowledge at all* of any irregularity in connection with bonds cashed for Rocco *until long after the completion of the transactions.* The bonds were delivered by Parnell to the Bank on September 28, 1948, and October 25, 1948. Myers, an F. B. I. agent, testified that he first called at the Bank regarding these bonds on January 14, 1949 (R. 381). He said he had called on Parnell regarding other bonds from Rocco on November 5, 1948 (R. 375). Parnell could not remember the date of the agent's visit (R. 487). According to his recollection and that of the Bank's cashier, the matter was discussed in January or February of 1949 (R. 308, 345-346, 353, 485). In any event, the notice was received *long after the completion of the transactions in this case.*

of Appeals, after argument, affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I—Conflict With State Law

The formal provisions of Rule 19 (b) relied upon to sustain issuance of the writ are that the Court of Appeals "has decided an important state . . . question in a way in conflict with applicable state . . . law" and "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

The substantive public interest and importance of a correct decision of the issues involved in the case flow from the disastrous consequences to the banking system and the investing public which would result from the decision below.

Not only will the individual bank and lawyer involved in the instant case be subjected to a liability of approximately $60,000 by reason of extending a courtesy to a customer and client, but if liability for conversion of bonds transmitted for redemption can be imposed on the basis of such flimsy evidence, banks will be obliged out of caution to discontinue their "conduit" service in connection with redemptions; and this would mean that every holder of maturing government coupon bonds would be required to present them directly

to the Treasury at Washington or at one of the 18 Federal Reserve Banks located in large cities throughout the nation.

Public policy would clearly seem to require that adequate protection against liability for conversion should be accorded to "conduit" banks, so that they can continue to afford their patrons, in rural as well as in a few metropolitan areas, the customary banking facilities for presenting government bonds in due course for redemption.

Since the rule applicable in the case at bar, being State law, would also apply to transactions in corporate, municipal, and other types of coupon bonds besides government issues, the paralysis of commerce and banking resulting from acceptance of the decision below would be even more widespread and disastrous.

If protection from liability for conversion is to be accorded only to parties having the status of "holder in due course" a "conduit" bank could never receive immunity. For the statutory definition of holder in due course (56 P. S. 132) includes the requirement of giving value. *But a "conduit" bank never gives value.* It never invests its own funds in the purchase of bonds handled. When it receives the bonds from its customers, it pays out nothing. After collection it merely disburses the proceeds it has collected. It never could be exempted from liability for conversion if such protection depends upon enjoying the status of holder in due course.

The common law of Pennsylvania accords protection from liability for conversion to "conduit" parties acting in good faith, without requiring them to establish their status as holders in due course. The leading case which establishes this proposition and governs the case at bar is *First National Bank* v. *Goldberg,* 340 Pa. 337 (1941). The facts in *Goldberg* are on all fours with the case at bar.[3]

In the *Goldberg* opinion the Supreme Court of

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[3] Only four differences (all immaterial) can be discerned in the facts of the case at bar when compared with *Goldberg*. (1) The bonds in *Goldberg* were corporate and municipal, not government issues. But they were negotiable bearer bonds, and any question of different treatment of the bonds in the case at bar because they are government obligations has been eliminated by this Court's decision. (2) The bonds in *Goldberg* were sold on the market rather than forwarded for redemption. But the immunity from liability for conversion accorded to the selling bank in *Goldberg* would apply *a fortiori* to a bank forwarding for redemption. For a sale certainly displays greater resemblance to "unauthorized exercise of dominion over the property of another" than collection of proceeds when a bond has matured. (3) Apparently in *Goldberg* the conduit bank's services were entirely gratuitous. In the case at bar the Bank deducted a few dollars for expenses. Parnell, like Goldberg, received a fee, not for services in connection with cashing the bonds but for legal advice regarding other matters; but apparently Parnell's fee was paid from proceeds of the bonds, and it does not appear whether that was so in the case of Goldberg's, though it may well have been. But even if a conduit party collects compensation for services in connection with the handling of the bonds themselves, he is not liable for conversion. The test is good faith, not whether the transaction was gratuitous or gainful. 340 Pa. at 342. (4) The bonds in *Goldberg* had been stolen from the plaintiff bank by armed robbers. The bonds in the case at bar simply disappeared from plaintiff's place of business under mysterious circumstances.

Pennsylvania, speaking through Mr. Justice (later Chief Justice) Horace Stern,[4] said:

> "Apart from the authorities cited,[5] it would seem clear that no liability should be imposed on agents or brokers acting innocently in such cases. The bonds, being negotiable, pass by delivery, and the transferee to whom they are sold, who takes them for value and in good faith, obtains a good title as against the real owner: *Cochran* v. *Chase Bank,* 209 Pa. 34, 58 A. 117; *Porter* v. *Levering,* 330 Pa. 392, 397, 199 A. 482, 484. It would seem strange if

[4] Now of counsel for the First National Bank of Indiana on its petition for certiorari in this case, since his retirement and return to private practice.

[5] The Court had cited (p. 342) important authorities from other jurisdictions: *Pratt* v. *Higginson,* 230 Mass. 256 (1918) accorded protection to conduit parties in a case involving government and public utility bonds, even though compensation was received for effecting the sale. In New York, the highest Court of that State, on which Chief Judge (later Mr. Justice) Cardozo and other eminent judges then sat, spoke to the same effect in *Gruntal* v. *U. S. F. & G. Co.,* 254 N. Y. 468 (1930).

The Court also cited Restatement, Agency sec. 349, comment g, and Torts Sec. 233, sub-section 4 in support of the same view; and noted that apparently the only case to be the contrary is *Kimball* v. *Billings,* 55 Maine 141, 152 (1867), but there the agent who sold the bonds still held the proceeds (pp. 145-50); *Smith* v. *Harlow,* 64 Maine 510, 516-17 (1874).

In addition to the authorities cited by Mr. Justice Stern, mention might be made of the current trend toward relieving an auctioneer or carrier from liability for conversion, even in the case of chattels. Warren, *Trover and Conversion* 90-92 (1936); *U. S.* v. *Matthews,* 139 F. Supp. 683 (N. D. Calif. N. D. 1956). Cf. Holmes, *The Common Law,* 83 (1881)

> the broker, who is thus the conduit of a valid title, should be held responsible for a conversion although he acted in the same good faith as the purchaser. In the present case, *defendants did not part with value for the bonds,* but they do not claim any right, title or interest therein as holders; they derived no benefit from the transactions, acting merely as agencies to place the bonds in the hands of brokers for sale and to transmit the proceeds in return. The purpose of the Negotiable Instruments Law is to enhance the marketability of such securities and to allow bankers, brokers and people generally to trade in them with confidence. That object would be defeated if liability were to be imposed upon one who, mistakenly but in good faith, deals with negotiable instruments on the assumption that they belong to the person who employs him to effect their sale through ordinary market channels." 340 Pa. at 342-3. Italics supplied.

It will be noted that the ruling in the *Goldberg* case relieving conduit parties of liability for conversion is declared by the Pennsylvania Supreme Court in the *Goldberg* case *as a matter of the substantive common law of the State. It is not derived from statutory interpretation of the Negotiable Instruments Law.*

If the statutory definition of a holder in due

course (section 52 of the N. I. L., 56 P. S. 132) containing the requirement of taking for value were applied, of course the conduit parties could not have been relieved of liability for conversion.

But the Supreme Court expressly held that such parties were protected against liability for conversion, even though, as Mr. Justice Stern points out, in the above quoted extract, *they "did not part with value for the bonds"* (p. 343).

The *Goldberg* rule is thus a rule of Pennsylvania common law, independent of statutory enactment, and not derived from or based upon any provision of the Negotiable Instruments Law. But the courts below, contrary to the law of Pennsylvania, treated section 59 of the Negotiable Instruments Law as applicable.

The trial court ruled that the "conduit" bank had the burden of proving its status as "holder in due course" of the bonds involved in the case. That concept includes, *inter alia,* proof of giving value. The trial judge said "Had they been purchased for investment, for this bank's portfolio, then I would have agreed with you" and would have granted a directed verdict in favor of the Bank (R. 402. See also R. 222, 228, 230, 235, 260, 264-65, 404-5, 420-22, 446).

Likewise the Court of Appeals, in the opinion now sought to be reviewed, held that "the burden is on that bank [the "conduit" bank, First National Bank in Indiana] to prove *that it was a*

holder in due course." (P. 25, *infra,* Italics supplied).

We submit that the public interest requires, and the Pennsylvania law provides, that if a purchasing bank would be protected, a "conduit" bank should be protected *a fortiori.*

Any other rule would paralyze the banking system and clog the normal channels of commerce. It would be utterly irrational and impracticable to hold a bank which merely acted as an agency for the transmission of bonds and disbursement of the proceeds collected to a higher standard of care and diligence than is required of a bank which occupies the status of a prospective purchaser of such bonds for investment. Reason and logic dictate that the investor should be held to a stricter standard than the mere instrumentality of commercial intercourse, if there is to be a distinction. A contrary rule would be absurd and disastrous. A "conduit" bank is entitled to protection *a fortiori* in a situation where a purchasing bank would be protected. The rulings below were clearly wrong.

It is the established public policy of Pennsylvania law to accord extensive protection to banks, and to relieve them from liability in connection with transactions handled in the normal course of business. This is shown not only by the *Goldberg* decision but by other statutes mentioned in that opinion relating to banks (340 Pa. at 340-41).

In a Pennsylvania court a bank could never be subjected to liability on the basis of the evidence in this record. A Pennsylvania tribunal would hold, as in the *Goldberg* case, that from the evidence in the record "no inference of bad faith on the part of either defendant can be drawn" and that the Court should declare "as a matter of law that the facts conclusively establish the innocence of the defendants in the transactions" (340 Pa., at 340, 341).

The *Goldberg* case likewise makes plain that under Pennsylvania law liability cannot be based merely upon the existence of suspicious circumstances! "To defeat the rights of one dealing with negotiable securities it is not enough to show that he took them under circumstances which ought to excite the suspicion of a prudent man and cause him to make inquiry, but that he had actual knowledge of an infirmity or defect, or of such facts that his failure to make further inquiry would indicate a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a vice in the transaction." In other words "the test is not care but good faith" (340 Pa. at 340).

Measured by this test, prescribed by Pennsylvania law, it is clear that the Court of Appeals has not disposed of this litigation as a Pennsylvania court would have done. The Court of Appeals regards it as sufficient that "The circumstances with regard to the negotiation were such

as to arouse some suspicion." (The Court concedes that "These items, of course, are not conclusive.") (P. 25, 26 *infra*).

If banking institutions in the important commercial State of Pennsylvania can be held liable for conversion on such flimsy inferences and such unsubstantial evidence, the public policy of that Commonwealth in favor of according extensive protection to the banking system and the security of transactions will be subverted.

From the foregoing it seems clear that the Court of Appeals has decided an important question of State law in a way which conflicts with the substantive common law of Pennsylvania as declared by the Supreme Court of that Commonwealth.

II—Denial of Fair Trial

But in any event Parnell and the Bank were denied a fair trial when the judge's charge placed them in a different and worse position than their co-defendant Rocco.

Although at the time this case was tried Rocco had been convicted of interstate transportation of stolen property and the jury could see him sitting in the courtroom in the custody of deputy marshals, *there was no testimony of record to show actual knowledge or bad faith even with respect to Rocco.* Plaintiff at one time contemplated offering the indictment and sentence of Rocco as

proof of knowledge by Rocco that his title to the bonds was defective (R. 202), but upon reflection the offer was withdrawn, as a matter of trial tactics (R. 251).

So, the trial judge charged the jury that with respect to Rocco the presumption that he was a holder in due course remained in effect, and that the burden of proof rested upon the plaintff throughout the case insofar as Rocco was concerned (R. 422).

But with respect to Parnell and the Bank in Indiana the trial judge charged that the burden of proof had shifted to defendants. The jury was told that they were obliged "to exculpate themselves from any charge of any dishonesty."

This unjustifiable discrimination was extremely injurious to petitioners. There was no justification for according to Rocco a more advantageous status than the conduit parties who merely transmitted the bonds on his behalf for redemption.

When the jury was told that the convict Rocco was presumed to have been acting in good faith but that Parnell and the Bank in Indiana occupied a less favorable status than Rocco and were obliged to vindicate themselves from the imputation of bad faith, how could the jury be expected to return a verdict that would be fair to appellants?

If Section 59 of the N. I. L. had any bearing on the case at all, it applied with equal force to

all three of these defendants. The trial court's unjust discrimination against Parnell and the Bank unquestionably injured them seriously.

The very terms of Section 59 itself accord to every holder the benefit of the title held by the "person under whom he claims." Likewise Section 58 (56 P. S. 138) provides that "a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

How then could the conduit parties, the petitioners Parnell and the Bank, have a status inferior to that of Rocco, from whom their claim was derived?

This discrimination against Parnell and the Bank amounts to such a departure from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

III—No Substantial Evidence

Likewise extraordinary and calling for correction is the action of the Court of Appeals in reaching a different result in its second opinion although the facts and evidence are exactly the same as before.

In its earlier opinion the Court of Appeals

said: "As far as the Indiana Bank is concerned, we do not think there was any evidence of bad faith." Payment in bills of small denomination (which were all that the Bank had on hand in the normal course of business) and telephone calls to Parnell when the proceeds of the redeemed bonds were available (an ordinary courtesy) were the only circumstances on which a finding of lack of good faith could be bottomed. These were not enough. "Accepting these facts as we have outlined them, we do not think they show any bad faith on the part of the Indiana bank." (226 F. (2d) at 300).

The contrary conclusion in the decision now sought to be reviewed is based upon precisely the same two circumstances: small bills and phone calls. (P. 25, *infra*).

A verdict and judgment based on such flimsy inferences and unsubstantial evidence would not be permitted by a Pennsylvania court to stand, even though the Bank and Parnell have the burden of proof on the issue of good faith.

For the Court of Appeals to change its prior holding without any new or substantial evidence to support its action is a departure from the nor-

mal course of judicial procedure calling for correction by exertion of this Court's supervisory power.

Furthermore, while not relying upon erroneous rulings on admissibility of evidence as a ground of certiorari, we reserve the right to argue those points if certiorari is granted. We challenge the questionable assumption of the Court of Appeals (p. 29, *infra*), that "one may seriously doubt whether" an exhibit on the letterhead of the FBI, "had any significance at all" when it got to the jury. These rulings on evidence, if erroneous, were undoubtedly harmful.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

EDWARD DUMBAULD
Counsel for Petitioner

April, 1957.

APPENDIX A

Opinion

By Goodrich, Circuit Judge.

These cases are before this Court on remand from the Supreme Court of the United States, 352 U. S. 29 (1956). The original suit was brought to recover the proceeds of certain bonds guaranteed by the United States and alleged to have been stolen from the plaintiff. It was further alleged that the bonds were paid by the Federal Reserve Bank of Cleveland to the defendant, First National Bank in Indiana, Pennsylvania, which in turn paid the proceeds to the defendant, Parnell, who in turn turned over all or part of the money to the defendant, Rocco. The Federal Reserve Bank of Cleveland was also an original defendant but was dismissed during the litigation. Rocco had judgment given against him but did not appeal. At the trial in the district court judgment was also given against Parnell and the Indiana Bank. When the case came to this Court the judgment was reversed, 226 F. 2d 297 (1955).

The case was heard by the full court which divided four to three. The difference between majority and minority was with regard to whether federal or state law applied as to the burden of proof to establish one a holder in due course of a negotiable instrument. The majority of the court thought that *Clearfield Trust Co.* v. *United*

States, 318 U. S. 363 (1943), required the application of federal law and that the federal rule differed from that in Pennsylvania. The minority believed that since this was but an action between individuals, in which the United States was not concerned, the state law controlled. The Supreme Court, in holding that the *Clearfield* case did not apply, said:

> "The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern." 352 U. S. at 33, 34.

I—The Pennsylvania Law

The governing statute at the time the transactions herein took place was the Negotiable Instruments Law. The bonds were bearer paper. Under the statute one who is in possession of negotiable paper payable to bearer is a holder. *Negotiable Instruments Law,* 191; Pa. Stat. Ann. tit. 56, 492 (Purdon 1930). Rocco, Parnell and the

Indiana Bank were all holders under this definition. Not only that, but they were persons to whom the instrument had been negotiated. Section 30 of the Negotiable Instruments Law states:

> "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery." Pa. Stat. Ann. tit. 56, 81 (Purdon 1930).

Now we come to the provision of the law that contains the controlling language for this case. That is Section 59 of the Negotiable Instruments Law and here is the appropriate section as it appear's in Purdon's:

> "Burden of proof when title is defective.
> "Every holder is deemed *prima facie,* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Pa. Stat. Ann. tit. 56, 139 (Purdon 1930).

This section has been applied in almost innumerable law suits, as an inspection of any one of

the books on the Negotiable Instruments Law will show. The point is made on behalf of the defendants that in this case we have an action for conversion of stolen instruments and not a suit against one of the parties thereon. The argument is pressed that the cited section refers to actions on the instrument only and not to such a case as this. *Filosi* v. *Crossman,* 111 Conn. 178, 149 Atl. 774 (1930), is cited in support of this argument. The language of Chief Justice Wheeler does support it.

But we are dealing only with Pennsylvania law in this particular phase of the inquiry. In *Schultheis* v. *Sellers,* 223 Pa. 513, 72 Atl. 887 (1909), Mr. Justice Mestrezat pointed out that almost a century before that:

> "* * * it was held, in an action on a promissory note, that the holder was required to show the consideration he paid for it and how it came into his hands, where the defendant proved that it was put into circulation fraudulently. This rule has been recognized and enforced in subsequent decisions." 223 Pa. at 516, 72 Atl. at 888.

The quotation just made is applicable to a suit upon the instrument and does not precisely meet the defendants' point. But *First National Bank of Blairstown* v. *Goldberg,* 340 Pa. 337, 17 A. 2d 377 (1941) does meet it. Mr. Justice Stern says for the court:

> "It was incumbent upon plaintiff to

> prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion." 340 Pa. at 340, 17 A. 2d at 378.

In the Goldberg case the court came to the conclusion that under the proof the defendant was entitled to judgment. But the application of the law seems to us very clear. The discussion in the opinion referring to the Restatements of Agency and Torts, on which the appellants rely, is all based on the hypothesis of the good faith of the defendants in handling a negotiable instrument.

Again in *Brubaker* v. *County of Berks,* 381 Pa. 157, 112 A. 2d 620 (1955), we have the rule of the Negotiable Instruments Law applied in a case where the suit was not upon the instrument. The same application of the status was made as in the *Goldberg* case.

We find no difficulty in determining Pennsylvania law which is in accord with the majority rule prior to the Negotiable Instruments Law and the overwhelming weight of authority since. The burden of proof set out in Section 59, above quoted, is applicable in this case.

II—The Case for the Jury

As to Parnell, let us quote from the majority opinion when the case was here before. It will be

remembered that the majority were going on the theory that the plaintiffs, not the defendants, had the burden on the issues of good faith and lack of value. Nevertheless, the Court said (as to Parnell):

> "There was evidence which, if believed, would sustain the jury's verdict that he acted in bad faith. From Rocco's testimony, the jury could have inferred that Parnell's fee for cashing the bonds was extremely high, being approximately ten per cent of the value of the bonds. A fee of five or six thousand dollars for the mere transmittal of bonds for redemption would be sufficient evidence from which a jury could find bad faith." 226 F. 2d at 302.

With the burden of proof upon Parnell, not the Bank of America, the result is *a fortiori*.

As to the Indiana Bank, we think that there is enough evidence to support the jury's verdict, remembering that the burden is on that Bank to prove that it was a holder in due course. The Bank's then cashier admitted that he knew that the bonds had been called. The circumstances with regard to the negotiation were such as to arouse some suspicion. The two batches of bonds were concerned and one earlier had been collected by the bank on behalf of Parnell. Each time notification was given him by telephone by the same bank cashier. Each time he received a cashier's check and proceeded to cash the check in small

bills forthwith. These items, of course, are not conclusive.

But it is to be remembered that the burden is on the bank. Its then cashier testified that he had no notice of any defect of title. His memory was vague on many surrounding circumstances concerning the transactions. That in itself is not enough to prove him dishonest since the transactions occurred some time before trial. But the jury saw the witness and heard his testimony. They had the fact, introduced in rebuttal, that he had been convicted of a felony of embezzlement. This was introduced without fanfare and whether it influenced the jury's consideration of his testimony we cannot know. The jury was not compelled to believe this bank officer. We have reread the testimony on this point. It does not justify setting aside a verdict against the party who had the burden establishing good faith and lack of notice.

III—Joint and Several Tortfeasors

At the first hearing of the case here the defendant bank raised the question of liability under Pennsylvania law of joint and several tortfeasors. This point was taken up in the dissenting opinion but not covered by the majority opinion since the majority was not called upon to decide it. The Supreme Court, however, has sent the case back here to determine the undecided points. And so we repeat pretty largely what was said in the dissenting opinion.

Defendant bank asked for an instruction to the effect that the plaintiff could not have a verdict against more than one of these alleged converters. This instruction was refused and it claims error. We think the bank is incorrect. The general rule with regard to the liability of several persons in such an action as this is that the satisfaction of the judgment against one precludes proceeding against another. This is the rule as it appears in the Restatement, Torts, 886; Restatement, Judgments, 95, and this is the rule as it is generally applied in Pennsylvania. *Union of Russian Societies of St. Michael & St. George, Inc.* v. *Koss,* 348 Pa. 574, 36 A. 2d 433 (1944). There is some early authority in Pennsylvania that seems to indicate in actions for conversion that the securing of a judgment against one alleged tortfeasor has the same effect. See, *e.g., Hyde* v. *Kiehl,* 183 Pa. 414, 38 Atl. 998 (1898). These cases are not new and the authorities above cited announce the present-day rule. Whether the older cases represent the present law of Pennsylvania is doubtful. See Goodrich-Amram, Pennsylvania Procedural Rules Service, 2229 (b), 2232 (f)-1 (1940). But even then they do not go so far as to preclude a verdict against more than one defendant. It might well be, if they were still effective, that a plaintiff would have to elect, before judgment was entered, which defendant he wanted to pursue. There is, we conclude, no merit in this point made by the defendant.

IV—Certain Objections to Evidence

The defendants claim prejudice when the trial judge refused to allow them to show the remarks of the sentencing judge at the time the bank cashier was convicted. This is not a proper subject for complaint. The extent to which a witness may be rehabilitated after his credibility is attacked by showing that he has been convicted of a felony is a matter in which the trial judge has, and must have, wide control. *United States* v. *Boyer,* 150 F. 2d 595 (D. C. Cir. 1945.)

There were certain exhibits to which objection was made. These consisted of a notice sent out by the Federal Reserve Bank of San Francisco to the Pittsburgh Branch, Federal Reserve Bank of Cleveland and a copy of a notice circulated by the Federal Bureau of Investigation in the area of the Pittsburgh Branch of the Federal Reserve Bank of Cleveland. It is not claimed that any of these reached the Indiana Bank so as to charge it with the knowledge which these notices contained. The judge limited their use to the establishment of the loss by the plaintiff and that notices of the loss went out through banking channels. This was not error. The analogy of the "hue and cry" immediately suggests itself. And we think that the fact of a notice being broadcast in the bank's vicinity is admissible on the question of whether the bank may have had some knowledge.

The lack of possible harm from these exhibits even if the judge was too lenient in admitting them is observed when one reads the interminable colloquy which preceded their admissions. At least six lawyers were involved and questions and objections came with rapid-fire frequency. One may seriously doubt whether the documents had any significance at all as they got to the jury. Nothing was said about them in the judge's charge and no one asked the judge to say anything more than he did on the point. It seems clear to us going through the record of a vigorously contested trial that instances of this kind are swallowed up in the sum total of the testimony and have no significance until lawyers examine the record to find error.

The case was technical. The Trial judge instructed the jury fully and accurately. The jury has reached a permissible conclusion

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

FILED
MAY 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 975

GILBERT A. PARNELL, Petitioner

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The statement of the case by petitioner (Petition 4-5) is considered substantially deficient in that it fails to reflect the nature of, and the conflicts in, the testimony relied upon to establish that the petitioner acted honestly, innocently and in good faith.

The facts shown by the printed record, which consists of approximately five hundred pages, are stated in the respondent's brief in opposition to the petition for a writ of certiorari filed by the First National Bank in Indiana, Pennsylvania, at No. 888, and need not be

restated in detail here. We repeat, however, a portion of what was said at page 3 of that brief:

> "The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The credibility of the defendant Parnell was impeached by his own prior inconsistent testimony in another proceeding (R. 472-478) and also by the testimony of an F.B.I. Agent (R. 319, 371-375) and of the defendant Rocco (R. 482-483, 489-492). The testimony of the cashier, Straitiff, is conflicting in itself (R. 345-346) and also in conflict with the testimony of F.B.I. Agent Myers (R. 345, 353, 381). His credibility was impeached generally by the introduction of the record of his conviction of embezzlement from the defendant bank (R. 390-393)."

It may not be inappropriate to point out also that the instant petitioner's statement (Petition 5) that Mr. Parnell received a fee for services and "not for cashing the bonds" and that the fee was $650 or "a larger amount" is hardly a clear statement of the evidence which was presented to the jury. The petitioner testified that he received $650, as a retainer and fee for legal services, and no other sums whatever (R. 317); but he was contradicted by the defendant Rocco, who testified that Mr. Parnell received, out of the proceeds of the bonds, five or six thousand dollars (R. 488-492). And the petitioners did not undertake to question Rocco by a single question of cross-examination (R. 493).

ARGUMENT

I.

The innocence and good faith of the petitioner was a jury question and the evidence insufficient to warrant setting aside the verdict.

The argument advanced in Points I (Petition 6-14) and III (Petition 16-18) proceeds throughout on the faulty premises that good faith is established as a matter of law, and without the necessity of leaving oral and conflicting testimony to a jury, if an adversary has not proved bad faith affirmatively.[1] The point wholly overlooked is that the jury was not required to accept the petitioner-defendant's protestations of innocence and good faith, particularly in view of the circumstances surrounding the transaction. The rule applicable here is as stated by the Pennsylvania Supreme Court in *Zenner v. Goetz,* 324 Pa. 432, 437, 188 Atl. 124 (1936), where, quoting from an earlier decision, the court said:

> ". . . in all our recent cases, we have consistently held that oral evidence relied on to overcome presumptions sufficient to take plaintiff's case to the jury, must be submitted to that body to determine as to the credibility of the witnesses, the inferences to be drawn from their testimony, and the

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1. Petitioner labored under no such misapprehension when the case was before the Court of Appeals originally. The petitioner's position then was, as is pointed out by Judge Staley in the opinion for the majority of the Court of Appeals in its first opinion, that Pennsylvania law was not applicable and that under Federal law "significantly different results would be reached" (226 F. 2d 297, 299).

facts to be found therefrom, unless the testimony in question, being clear, positive, credible, uncontradicted and indisputable, shows physical facts, or forms the basis for mathematical tests which demonstratively govern the case in defendant's favor."

The evidence offered did not convince the jury. The District Judge, who also saw the witnesses and heard the testimony, described the verdict as "just and proper under the evidence presented" (R. 447). The Court of Appeals has agreed, unanimously, that the verdict is a permissible one in view of the burden of proof resting on petitioner-defendant under Pennsylvania law. The facts having been so found, the case is not one for review here. Cf. *Comstock v. Group of Industrial Investors,* 335 U. S. 211, 214; and *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U. S. 271, 275.

II.

There was no denial of a fair trial.

The instant petitioner claims (Petition 14-16) that he was denied a fair trial because the District Judge, rightly or wrongly, instructed the jury that the defendant Rocco did not have the burden of demonstrating his own good faith. In the first place, petitioner did not except to the charge (R. 431) and, secondly, petitioner at all times insisted that he should not be treated as claiming the rights of a holder in due course. The charge as a whole (R. 414-433) was eminently fair, and the fact that an isolated sentence may have been unduly favorable to another defendant cannot be said to have resulted in the denial of a fair trial to this petitioner.

CONCLUSION

The decision below involves solely a question of Pennsylvania law which has been decided correctly by the Court of Appeals. No question is raised by the petition which would warrant review by this Court.

Respectfully submitted,

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Reply of Petitioner to Respondent's Brief in Opposition to Certiorari.

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I

ON THE ENTIRE RECORD, THERE WAS NO SUBSTANTIAL EVIDENCE WARRANTING ANY INFERENCE OTHER THAN THAT OF THE CONDUIT PARTIES' GOOD FAITH IN TRANSMITTING THE BONDS FOR REDEMPTION.

Respondent's brief in opposition considers our statement of the case "substantially deficient in that it fails to reflect the nature of, and the conflicts in, the testimony relied upon to establish" the good faith of petitioner (Br. 1).

We find the same "substantial deficiency" in respondent's statement at No. 888, which he incorporates by reference, and particularly in the paragraph repeated at page 2 of his brief in opposition herein.

Respondent there says: "The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the Bank's cashier."

This is entirely incorrect. Substantially all of the circumstances proving defendants' good faith were proved by plaintiff's own case. Much of this evidence was documentary. The evidence of the F. B. I. agent Myers, called by plaintiff, is also relied on strongly by defendants to prove their good faith.

It was not an unusual misfortune that plaintiff's own case fully disclosed the circumstances relieving defendants from liability. Plaintiffs frequently disclose during presentation of their own case circumstances destructive of their right to recover. For example, this often occurs where the plaintiff's own evidence reveals the existence of contributory negligence, an affirmative defense upon which defendant has the burden of proof: *Health* v. *Klosterman*, 343 Pa. 501, 503 (1941).

It must be remembered that the only difference between the federal law, relied upon by the ma-

jority of the Court of Appeals in its former opinion, and the State law of Pennsylvania, which this Court has determined governs the case, is with respect to incidence of the burden of proof. Under federal law, plaintiff would have that burden; under State law, the defendants.

To hold that defendants have the burden of proof certainly does not do away with or abolish the other familiar rule that a question cannot go to the jury unless, *upon the entire record,* there is testimony from which the jury could reasonably draw the inference sought to be drawn.

It does not matter whether defendants' witnesses or plaintiff's own evidence discloses the circumstances destructive of plaintiff's right to recover.

In this connection it must be remembered that the only burden upon defendants, under Pennsylvania law, is that described in the following quotation from the *Goldberg* case, upon which respondent so strongly relies (Br. at No. 888, p. 7):

> "It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities *under such circumstances as to relieve them from liability for a conversion.*" (340 Pa. at 340, italics supplied).

Respondent, like the trial court and the court below, erroneously argues that Section 59 of the Negotiable Instruments Law was there applied in the *Goldberg* case (Br. at No. 888, p. 7).

Careful reexamination of the *Goldberg* opinion indicates that Section 59 of the N. I. L. is nowhere mentioned. Shepard's Citations under Section 59 of the N. I. L. does not list the *Goldberg* case. As we state at page 11 of our petition for certiorari, the *Goldberg* rule declares the substantive *common law of Pennsylvania,* independent of statute, and entirely apart from any provision of the N. I. L.

On the same page of the *Goldberg* opinion as the above quoted passage upon which respondent relies, the Court goes on to specify what is meant by "such circumstances as to relieve [defendants] from liability for a conversion."

The circumstances so specified are not the requirements of Section 59 and Section 52 of the N. I. L., but merely the circumstances of acting in good faith as a "conduit" party. This is the very essence of the substantive rule set forth in the *Goldberg* decision. The test is not care but good faith. To defeat the rights of one dealing with negotiable securities it is not enough to show that he took them under circumstances which ought to excite suspicion, "but that he had *actual knowledge* of an infirmity or defect," or of such

facts that his failure to make further inquiry would indicate a deliberate desire to evade such knowledge (340 Pa. at 340).

What then is the evidence in the record with respect to the "actual knowledge" of Parnell and the Bank in Indiana, on September 25, 1948 and on October 25, 1948, when the transactions involved in the case at bar occurred?

It must be emphasized that under applicable law defendants' rights depend upon their "actual knowledge" as of the date when the transactions took place, and not what they have since learned in the light of "hindsight" and subsequent revelations.

What did the testimony of F. B. I. Agent Myers show regarding these transactions? He testified that he first called on Parnell regarding the Home Owners Loan Corporation bonds involved in this case on January 8, 1949 (R. 377). He first called at the Bank in Indiana regarding these bonds on January 14, 1949 (R. 381).

These dates were long after the completion of the transactions on September 28, 1948 and October 25, 1948, respectively.

The first suspicious circumstances regarding bonds received from Rocco came to light in con-

nection with other bonds not involved in this case. These were $5,000 of United States Treasury bonds and $20,000 West Penn Power bonds. *They had been forwarded on September 10, 1948. Suppose that a reasonable inference might be made by a jury that Parnell and the Bank were chargeable with "actual knowledge" of defects in the Home Owners Loan Corporation bonds involved in this case from the date when they learned of a defect in other bonds coming from Rocco. Even if this unwarranted assumption be made, it does not benefit respondent, for the F. B. I. Agent's testi-

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* In this connection it should be mentioned that respondent's statement (Br. at No. 888, page 2) regarding the West Penn and Treasury bonds is not accurate. The "suspicious" circumstances (telephone calls to Parnell from the cashier and Parnell's cashing the check in bills of small denominations) upon which the Court of Appeals relies, were not applicable to the transactions in these bonds. When the proceeds of those bonds were received, Parnell was out of town and his partner Earl Handler obtained the money from the bank and turned it over to Rocco (R. 314-15).

The only pertinence of these bonds handled on September 10, 1948, to the case at bar is that the fact that they were paid in due course without any question being raised constitutes further evidence to confirm Parnell's good faith in his later dealings with the H. O. L. C. bonds involved in the case at bar.

In the ordinary course of business Parnell would expect that if there was anything wrong with any bonds or other items entrusted to a bank for collection, notification to that effect would be received, instead of the money. At the date of the transactions involved in the case at bar, the proceeds of the $25,000 of other securities previously forwarded for Rocco had been received in due course through the customary banking channels, with no questions raised. There was nothing to excite Parnell's suspicion when the H. O. L. C. bonds were brought to him by Rocco and Parnell's partner who was handling Rocco's legal work in the Parnell firm.

mony shows that it was not until November 5, 1948, that he called on Parnell regarding the $5,000 of Treasury bonds (R. 372, 375). Even if this date is taken as putting Parnell on notice, it falls several weeks after the completion of the last transaction with respect to bonds involved in this case (October 25, 1948).

We submit that the only reasonable inference to be drawn from the testimony of the F. B. I. Agent and from plaintiff's own case is that at the time of the transactions involved in the case at bar Parnell and the Bank in Indiana had no "actual knowledge" of any defect in the Home Owners Loan Corporation bonds delivered.

Respondent, erroneously assuming that defendants' good faith is shown only by the testimony of Parnell and of the Bank's cashier Straitiff, proceeds to argue that Parnell's testimony was contradicted by that of the F. B. I. Agent (Br. 2).

What is the extent of that contradiction? Parnell said that he first learned of the question regarding the Home Owners Loan bonds in "January or February of 1949" (R. 308); the F. B. I. Agent fixed the date as January 8, 1949 (R. 377). Such a trifling defect of recollection with respect to exact dates, regarding a collateral matter, certainly does not constitute testimony from which any inference of bad faith could be drawn.

II

DENIAL OF FAIR TRIAL

Respondent (Br. p. 4) endeavors to pass off as "an isolated sentence" in the trial court's charge the unjustifiable discrimination between defendant Rocco and the conduit parties whose title was derived from him.

This discriminatory treatment was not a mere isolated fragment of the charge, but a fundamental feature of the theory of the case entertained by the trial court, and repeatedly affirmed throughout the trial. (See record references in Petition p. 11.)

Perhaps the most striking statement of the trial court's erroneous theory is found (R. 264) in the court's disposition of the motion to dismiss made by the Bank in Indiana at the close of plaintiff's case:

> "That is the crux of this case. That is what we are confronted with, the ruling that is to be made on that, the plaintiff having rested. I say very frankly, if you were a holder in due course for value, at this stage of the record, with the proof at hand, your position would be correct. I think you would be entitled to a dismissal."

This erroneous theory, that Section 59 of the Negotiable Instruments Law required defendants to prove that they were holders in due course, thus

not only resulted in unjust discrimination between Rocco and the conduit parties, but also induced the Court to deny the Bank's motion to dismiss.

This error was therefore certainly extremely harmful and detrimental to petitioners. It was a basic feature of the trial court's thinking, and cannot be shrugged off as "an isolated sentence" in a charge otherwise fair to the parties. It colored the court's action throughout the entire case.

And the trial court's theory is undeniably error, under the law of Pennsylvania, since the very essence and heart of the point decided in the *Goldberg* case is that conduit parties are relieved from liability even *though they "did not part with value for the bonds"* (340 Pa. at 343, quoted in Pet. pp. 10-11).

CONCLUSION

Accordingly it seems clear that the court below misapprehended the law of Pennsylvania in a manner seriously detrimental to the rights of petitioner, in a matter of great importance to the administration of the banking laws and the financial policy of that State. Accordingly review by this Court is appropriate.

Respectfully submitted,

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